there has been no question of fraud or misappropriation has been held to amount to professional misconduct. In this connection, I would refer to the case of *In the Matter of a Solicitor*[2]. That was a case where a solicitor had collected a sum of money on behalf of an ignorant and partially illiterate client, had retained the greater part of it without her consent and notwithstanding her repeated applications for payment, and had only paid over what was admittedly due after he was aware that the complainant had made application to a Magistrate for assistance. On these facts the Law Society had found that the solicitor had been guilty of professional misconduct, and on their application the matter came before the Court. Wills, J., said that he saw no evidence of any misrepresentation or deceit on the part of the solicitor. When it was submitted by counsel that but for the application of the client to the Magistrate the money would never have been handed over and that, although the Committee had not said so, that was implied in their findings, His Lordship replied: "The Committee if they do not find a fact expressly cannot expect us to go beyond their finding". He went on to hold that professional misconduct had not been made out.

As I have already said, it is not open to me at this stage to go behind the findings of fact of the Disciplinary Committee; I have to accept them. On this particular allegation, the findings of fact amount to no more than this: that A.B. received the money, that he did little or no work for it and that he refused, when called upon, to refund it. There is no finding that he did these things with the intention of misappropriating the money or defrauding the client or with any other dishonest intention. It may well be that it was open to the Committee on the evidence before them to find that there was such an intention. They have not done so, and I am bound to assume that they had good reasons for not doing so.

In the circumstances, I propose to say that the facts found by the Committee do not make out the offence of grossly improper professional conduct or any other offence under Section 26. What these findings amount to is that there has been a breach of contract on the part of A.B. The penalty imposed by the Courts for breach of contract is damages and costs and I can find no authority for saying that where the party in breach of a contract is a solicitor he should be subject to punishment for improper conduct unless it is clearly found that the breach has been attended by some circumstance of dishonesty.

Apart from any question of authority, I am not prepared to say that there is anything disgraceful or dishonourable in a solicitor refusing to comply with a request to pay over money to a client unless it is shewn that that refusal is actuated by dishonest motives. It seems to me that if I were to hold otherwise it would be unsafe for a solicitor to attempt to defend himself against any claim made against him by a client, however confident he was of the justice of his case.

The application is dismissed.

Application dismissed.

LIM SAY HUN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Spenser-Wilkinson, J.)
March 20, 1950]

[K.L. — Criminal Appeal No. 78 of 1949]

Opium and Chandu Proclamation, s. 3 — Possession of chandu — Meaning of "occupier" — Burden of proof.

In this case the appellant was convicted of possession of chandu in a house at Batu Lane, Kuala Lumpur. The appellant was found in a hall which was the only means of access to various rooms in the house occupied by different sub-tenants. One of the questions raised on appeal was whether the learned President who tried the case was right in finding that the appellant was the occupier of the hall and therefore that the presumption under s. 3(2) of the Opium and Chandu Proclamation applied against him.

Held, (1) that on the facts the appellant was not in exclusive occupation of the hall and therefore he could not be held to be the occupier of the hall; (2) that there was sufficient evidence **aliunde** to show that he was in possession of the chandu and therefore the conviction of the appellant must be upheld.

Obiter: The case of **Rex v. Carr-Briant (3)** which decided that the burden placed upon an accused person where some matter is presumed against him "unless the contrary is proved" may be discharged by evidence satisfying the Court of the probability of that which the accused is called upon to establish, is applicable in cases under the Opium and Chandu Proclamation.

Cases referred to:—

(1) *Ong Eng Soo and two others v. Public Prosecutor* (1949) M.L.J. 231.

(2) *Official Receiver and Liquidator v. Grigg and another* 7 F.M.S.L.R. 48.

(3) *Rex v. Carr-Briant* 29 Cr. App. R. 76.

(4) *Rex v. Garth* 33 Cr. App. R. 100.

CRIMINAL APPEAL from Sessions Court.

E. D. Shearn for the appellant.

C. M. Sheridan for the respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Spenser-Wilkinson, J. : — The appellant in this case was charged in the Sessions Court jointly with one Tay Kim Huat under the provisions of section 3 (1) of the Opium and Chandu Proclamation with possession of chandu in a house in Batu Lane at 2 a.m. on the 29th September, 1949.

Tay Kim Huat pleaded guilty to the charge of possession and there is no doubt on the evidence that chandu was being cooked that night upon two stoves in the small entrance hall of the house in question. The case against the appellant was that he was also in possession jointly with Tay Kim Huat of this chandu which was being cooked.

The questions raised at the hearing of this appeal were :—

(1) Did the prosecution establish that the appellant was the occupier of the entrance hall of this house so as to raise the presumption against him under sub-section (2) of section 3 of the Proclamation?

(2) If the presumption was properly raised against the appellant did he discharge the onus cast upon him by that sub-section of proving that he was not in possession? and

(3) If the presumption did not arise did the prosecution prove possession by other evidence?

The learned President held that the appellant was the occupier of this hall within the meaning of section 3 (2) of the Proclamation which reads as follows :—

"(2) Any opium or chandu which is found on any part of any premises, shall be deemed, unless the contrary be proved, to be in the possession of the occupier of such part of the premises."

In coming to this decision the President purported to follow a decision of the High Court at Ipoh *Ong Eng Soo and two others v. Public Prosecutor*[1] part of the judgment in which reads as follows :—

". . . I am of opinion that in this particular sub-section of the Proclamation 'occupier' must mean anyone who is found in any part of the premises from which other persons are excluded. I do not think it can be meant only to include persons who necessarily reside on the premises, or that part of the premises, or who have control in running the premises or that particular part of the premises. I therefore think in this case where the appellants were discovered in a closed room in a closed house, out of which room the 1st appellant emerged . . . . that they are rightly held by the learned President to be occupiers of that room . . . . ."

I think in regard to this decision it is sufficient for me to quote from the judgment of Thorne, J. in the *Official Receiver and Liquidator v. Grigg and another*[2] :—

"It is a truism to say that a reported case is an authority only upon the point of law which was determined by the judgment upon the facts of the particular case.";

and to point out that it is clear from the last part of the extract from the Ipoh judgment above quoted that the facts of that case were different from the facts of the case now before me.

In the present case the hall in which the appellant was found was the only means of access to various rooms in the house occupied by various different sub-tenants and in my opinion, therefore, the element of exclusiveness which, it seems to me, is essential to constitute "the occupier" under the sub-section was entirely absent. In my opinion the prosecution did not succeed in proving that the appellant was "the occupier" of the part of the premises in question and, therefore, the presumption should not have been raised against him.

It is unnecessary for me, therefore, to consider the interesting argument which was put before me by Mr. Shearn on behalf of the appellant with regard to the burden of proof in cases where the presumption under the Proclamation arises. In view of the fact, however, that the point was very fully argued before me I think I ought to express my opinion on the point. In my view the decisive authority on this question is the judgment in *Rex v. Carr-Briant*[3] where it was held that the burden placed upon an accused where some matter is presumed against him "unless the contrary is proved" may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish. It should be observed that this decision deals with the exact words used in sub-section (2) of section 3 of the Proclamation and I do not think, therefore, that it is in any way modified by the decision in *Rex v. Garth*[4] which dealt with the question of the presumption raised by the possession of stolen goods. There is to my mind a distinction between a statute which says that something *shall* be presumed "unless the contrary be proved" and section 114 (a) of the Evidence Enactment which says that the Court *may* presume that the person in possession of recently stolen goods is either the thief or the receiver unless he can "account for his possession".

It remains to decide whether, without the presumption, the prosecution in this case succeeded in proving that the appellant was in possession of the chandu in question. Mr. Shearn pointed out various respects in which he alleged that the President had mis-read the evidence. In particular the President refused to accept the evidence of the appellant's wife, not because he thought her to be a biased witness, but "in the light

of the evidence of the 1st and 2nd prosecution witnesses" and notwithstanding his own statement that her alleged actions were by no means impossible. Mr. Shearn pointed out, in my opinion, correctly, that the evidence of the appellant's wife was in no respect inconsistent with the evidence of the 1st and 2nd prosecution witnesses. He argued, therefore, that the President was not justified in rejecting the evidence of this witness. I agree that the President was not justified in rejecting this evidence upon the grounds stated, but even if it were accepted, the evidence of the appellant's wife could not, in my view, in the circumstances of this particular case have very great weight.

Mr. Shearn conceded that if, apart from the evidence misconceived by the President, there was sufficient evidence to support the finding of possession the conviction must stand. The last few sentences of the President's grounds of judgment read as follows :—

"Chandu was being cooked and prepared that night in the hall of this house. At about 10 p.m. both the accused were in the hall while the process was being carried on. At about 2 a.m. the 1st accused was found in the hall again while the process was being carried on whereas the 2nd accused was on his way back along the verandah from the bathroom. The Defence version really broke down on its first point, which was to the effect that both the accused were in the hall when the Customs Officers entered. This, as I have already stated, I categorically reject. It seemed to me, therefore, that the Prosecution had adduced evidence of a joint enterprise on the part of the two accused being in possession of chandu in these premises, evidence sufficient to justify a conviction. The evidence adduced by the Defence I find on due consideration of all the evidence to be unreasonable and untrue, and I reject it. I am quite satisfied that these two men were together engaged that night in preparing chandu. The 1st accused was therefore convicted."

A careful perusal of the record satisfies me that the evidence supports these findings. Both accused were seen in the hall at 10.00 p.m. by an independent witness of whom the President said that although she was a woman of low social status he was quite convinced she was speaking the truth. He added "She had no axe to grind for either the Prosecution or Defence; in fact I should have expected her to have given evidence favouring the Defence case since she was a tenant on a daily basis of the 1st accused, and there was never any suggestion that she bore any grudge against the 1st accused." At 2.00 a.m. the same night the appellant was again seen in the hall by the Customs Officers. The recorded evidence for the defence, even taken in conjunction with the evidence of the 3rd witness, raises no doubt in my mind as to the truth of the prosecution case and clearly raised no reasonable doubt in the mind of the President. There was, therefore, sufficient evidence upon which the President could find as a fact, independently of any presumption, that the appellant was in possession of this chandu. It follows, therefore, that any mis-direction of himself regarding the question of occupation or the effect of the 3rd witness's evidence did not result in any miscarriage of justice.

I therefore, hold that the conviction of the appellant was right and the appeal must be dismissed.

Appeal dismissed.

KARUPPIAH PILLAY v. K. P. MOHAMED.

[App. Civ. Juris. (Hill, J.) April 6, 1950]

[Ipoh — Civil Application No. 12 of 1950]

Civil Procedure Code (Cap. 7), ss. 220 and 531 — Application for extension of time to appeal — Special circumstances.

This was an application under s. 531 of the Civil Procedure Code to extend the time in which to appeal from the judgment of the Magistrates's Court, Kampar. The judgment was given on the 13th of February 1950 and the solicitors for the appellant wrote to the Magistrate for the notes of evidence and grounds of judgment on the 17th February, 1950. The appellant's solicitors did not make any enquiries or make any attempt to obtain the grounds of judgment within the time limited for bringing the appeal. The notes of evidence and grounds of judgment were not delivered till the 10th March and the record from the Magistrate's Court was not dealt with until the 13th March, on which date the period within which the appeal could be brought had expired.

Held, following the decision in **Manickam v. Tremelbye (Selangor) Rubber Co. Ltd.** (1), that no special circumstances had been shown in this case and the application for extension of time must be dismissed.

Case referred to :—

(1) *Manickam v. Tremelbye (Selangor) Rubber Co. Ltd.* (1949) M.L.J. 90.

CIVIL APPLICATION.

J. D. M. Donnelly for the applicant.

S. M. Sharma for the respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Hill, J. : — This is an application under Section 531 of Cap. 7 to extend the time in which to appeal against the judgment of the Magistrate's Court, Kampar.

The facts are as follows :—

(1) The Applicant was the Defendant in Civil Suit No. 5 of 1950 in the Magistrate's Court, Kampar. On 13th February, 1950, the Magistrate made an order for ejectment from premises in Kampar against the Applicant,